

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 23944-6-III

Respondent,

v.

MICHAEL J. KYNASTON,

Appellant.

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Division Three

UNPUBLISHED OPINION

KULIK, J.— A jury convicted Michael J. Kynaston of first degree burglary, second degree malicious mischief, and unlawful possession of a firearm. Mr. Kynaston contends the court erred by admitting a 911 tape because only the caller identified the tape, and she identified only her own voice. Mr. Kynaston also maintains that the court erred by refusing to reopen his case for recantation testimony, and that the prosecutor committed misconduct by expressing personal opinion.

We hold that a 911 tape recording can be authenticated by one of the parties to the call; that there was no compelling reason for the court to reopen the trial; and that the prosecutor properly argued from the evidence. Therefore, we affirm Mr. Kynaston's convictions.

FACTS

On September 25, 2004, Shelyce Hansen visited Kira Witkowski at her apartment. Mr. Michael Kynaston, also referred to as Michael Webb, went to Ms. Witkowski's apartment. Ms. Hansen and Ms. Witkowski knew Mr. Kynaston because he had dated Ms. Witkowski. Ms. Hansen heard glass breaking. Ms. Witkowski and Ms. Hansen left the apartment and found broken windows in Ms. Witkowski's vehicle.

Ms. Witkowski and Ms. Hansen drove to Ms. Hansen's apartment. Mr. Kynaston also went there. He yelled and knocked on the door, and windows. Ms. Hansen called 911. She called while she was lying on the floor hiding from Mr. Kynaston. Mr. Kynaston kicked the door open and came into the apartment holding a gun. Ms. Hansen hung up the phone, and the 911 operator called back. Mr. Kynaston left before the police arrived.

Mr. Kynaston was charged with first degree burglary, second degree malicious mischief, and unlawful possession of a firearm. He was convicted of all three counts and sentenced to a standard range sentence of 116 months. He appeals.

ANALYSIS

1.) Did the court err by admitting the 911 tape?

ER 901 requires the authentication of tangible evidence. A tape recording can be authenticated by an "earwitness" comparison if a foundational witness testifies that: (1)

he or she has personal knowledge of the events recorded on the tape; (2) he or she has listened to the tape and compared the tape with those events; and (3) the tape accurately portrays those events. *State v. Jackson*, 113 Wn. App. 762, 767, 54 P.3d 739 (2002). If the tape contains human voices, usually the witness must identify each voice. *Id.* The necessary foundation is provided if the witness's testimony is sufficient to support findings that the tape is what it is represented to be, and the tape is in substantially the same condition as it was on the relevant earlier date. *Id.*

The State presented Ms. Hansen to authenticate the tape. Ms. Hansen stated that she made a call to 911 on the night Mr. Kynaston came to her house, and that she listened to the tape before trial. Ms. Hansen testified that the tape played at trial was the same one she heard prior to trial. She stated she was the caller on the tape. Ms. Hansen's testimony demonstrated that the tape accurately portrayed what happened that night.

Mr. Kynaston contends that the tape was not properly authenticated because Ms. Hansen identified only her own voice. He asserts insufficient foundation to authenticate the 911 tape because Ms. Hansen did not testify that the tape accurately portrayed the original conversation, and there was no testimony as to the operator's competence in using recording machinery.

In *Jackson*, the court explained that the method of authentication of a tape is not exclusive, and a proponent may use any other method that produces sufficient evidence to

support the findings of identification and authentication. *Jackson*, 113 Wn. App. at 769. Ms. Hansen's testimony provided sufficient evidence to support identification and authentication. Even though she did not provide the name of the 911 operator, the identification of this voice as belonging to the 911 operator aided in the identification and authentication of the tape. Ms. Hansen's overall testimony provided the necessary foundation to authenticate the 911 tape.

The court did not err by admitting the 911 tape.

2.) Did the trial court abuse its discretion by refusing to reopen the case to allow Mr. Kynaston to call additional witnesses?

A trial court's decision whether to reopen a proceeding for additional testimony is reviewed for an abuse of discretion. *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001). A court abuses its discretion by basing a decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

On February 9, 2005, the State rested, defense counsel rested, and court was adjourned for the day. The next morning, the defense asked the court to reopen the case to hear testimony from three witnesses who would testify that Ms. Hansen had recanted her testimony. The court was informed that two of the three witnesses were present in the courtroom. The court denied the motion and stated: "Given the fact we've rested,

given the testimony that has already been heard, the 911 call itself, I will deny the motion.” Report of Proceedings (RP) at 77.

The court did not abuse its discretion by denying Mr. Kynaston’s motion. There was no compelling reason to reopen the case. More importantly, there was no prejudice because while these witnesses may have testified concerning Ms. Hansen’s repudiation of her testimony, Ms. Witkowski’s testimony and the 911 tape remained.

3.) Did the prosecutor engage in misconduct by improperly suggesting to the jury that two witnesses were afraid of Mr. Kynaston?

When considering allegations of prosecutorial misconduct, this court first must determine whether the comments are improper. If they are, the court must consider whether there was a substantial likelihood the comments affected the jury verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both of these elements. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Absent an objection to the comments during the trial, a request for a curative instruction, or a motion for a mistrial, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that the prejudice could not be obviated by a curative instruction. *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). Mr. Kynaston failed to object to the line of questioning he

challenges here. As a result, this court must apply this higher standard when evaluating the impropriety and the prejudicial effect of these comments.

Ms. Hansen testified, in part, as follows:

- Q. Why are you emotionally upset?
A. Because I don't want to be here.
Q. And why don't you want to be here?
A. Because.
Q. Are you afraid of anything?
A. No.
Q. Shelyce, do you know the defendant in this case?
A. Yes.
Q. Do you want to look at him?
A. Yeah.
Q. Is he in the courtroom?
A. Yes.
Q. Is he the gentleman next to me on my right?
A. Yes.
Q. How do you know him?
A. A friend from a long time ago.

RP at 36.

Later, the following exchange took place:

- Q. I want to ask you. You know we are watching you and you're not really looking to [sic] much at me or the jury---
Mr. Johnston: Objection, Judge. That is a comment on the . . .
The Court: Sustained. Go ahead.
Q. What is bothering you?
A. I don't want to be here.
Q. What are you worried about?
A. I'm not worried. I just don't want to be here.
Q. Is something causing you to be upset other than just testifying?
A. No.

RP at 43-44.

The prosecutor also questioned Ms. Witkowski. Her testimony reads, in part, as follows:

Q. What is bothering you?

A. I don't know.

Q. All right. Do you want to be here right now?

A. No, I don't.

Q. Why not?

A. Because I don't.

Q. Are you worried about anything?

A. No.

Q. Scared about anything?

A. Huh-uh.

Q. Do you know the defendant in this case, first name Michael Kynaston or Michael Webb?

A. Yes.

RP at 48.

Later, the following exchange took place:

Q. Well, Kira, it's correct to say you're not wanting to testify?

A. What for?

Q. You don't want to testify. That's coming through loud and clear, isn't it?

A. Yeah. What for?

Q. What do you mean "what for?"

A. Why?

Q. What are you afraid of?

A. I am not afraid of anything.

Q. Why don't you remember who it was now when you said on the day it happened that it was Mike Webb?

A. Who knows who it was.

Q. You know who it was, don't you?

A. No, I don't.

Q. You knew at the time, didn't you?

A. No.

Q. You wrote it down in your statement, didn't you?

A. I didn't write that. A cop did. Could have been anybody.

RP at 53-54.

Mr. Kynaston contends the State's questioning of these two witnesses focused on the witnesses' fear rather than the incident itself. According to Mr. Kynaston, the prosecutor's repeated questions about the witnesses' fear, discredited their previous statements, and insinuated that the witnesses were reluctant to testify because they were afraid of him. Mr. Kynaston argues that this method of questioning was flagrant and ill-intentioned, and the repetition of the prosecutor's questions created a substantial likelihood that the comments affected the jury's verdict.

Mr. Kynaston's arguments are based on *McClellan v. United States*, 706 A.2d 542 (D.C. 1997), and *Mercer v. United States*, 724 A.2d 1176 (D.C. 1999), *cert. denied*, 543 U.S. 1188, 125 S. Ct. 1425, 161 L. Ed. 2d 191 (2005). These cases state that evidence of a witness's fear tends to be prejudicial when it suggests that a witness fears reprisals by the defendant or his associates. *McClellan*, 706 A.2d at 551; *Mercer*, 724 A.2d at 1184.

Here, neither Ms. Hansen or Ms. Witkowski stated they were afraid of Mr. Kynaston. The prosecutor made general inquiries as to how the two women felt about testifying. Moreover, Mr. Kynaston did not object or request a curative instruction. The prosecutor's conduct was not flagrant and ill-intentioned, and any prejudice could have

been obviated by a curative instruction.

4.) Did the prosecutor's closing comments constitute prosecutorial misconduct?

Mr. Kynaston asserts the prosecutor improperly expressed his personal beliefs during closing. A prosecutor must not express an opinion as to his personal belief of the defendant's guilt. *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Mr. Kynaston bears the burden of showing the impropriety of the prosecutor's comments and their prejudicial effect. *See Hoffman*, 116 Wn.2d at 93. Because Mr. Kynaston did not object to the comments at trial, these comments may be reviewed only if they are flagrant and ill-intentioned so that the resulting prejudice could not be obviated by a curative instruction. *See Hoffman*, 116 Wn.2d at 93.

Mr. Kynaston challenges the following remarks by the prosecutor:

Ladies and gentlemen, he is guilty. There might be a tendency to think well he has three charges here. We can convict him of Residential Burglary rather than Burglary First Degree. Don't compromise this. He is guilty of all three charges and it's important to hold him accountable for what he did. I will ask you to find him guilty of every charge, Burglary in the First Degree, Malicious Mischief in the Second Degree and the Unlawful Possession of a Firearm Second Degree. Thank you.

RP at 86-87. (Emphasis added.)

The court must place the prosecutor's statements in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The prosecutor

has wide latitude in drawing and expressing reasonable inferences from evidence in the record. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). Hence, Mr. Kynaston must show that the prosecutor was not arguing inferences from the evidence but was expressing a personal opinion.

Here, the prosecutor made these comments at the end of his closing after he had gone through all of the evidence--including the 911 call and the testimony, explained the elements of the crime, and how the evidence proved each of the elements. Considered in the context of the entire closing, these comments are reasonable inferences from the record. Consequently, the comments did not constitute prosecutorial misconduct, were not flagrant and ill-intentioned, and did not result in any prejudice to Mr. Kynaston.

In summary, we conclude the trial court did not err by admitting the 911 tape or refusing to reopen the case. We also conclude there was no prosecutorial misconduct. We affirm.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to

No. 23944-6-III
State v. Kynaston

RCW 2.06.040.

Kulik, J.

WE CONCUR:

Kato, J.

Brown, J.